Supreme Court, U. S.
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Supreme Court of the United States

October Term, 1978

No.

In The Matter of 78-332

83RD REALTY COMPANY,
Debtor-Petitioner,

vs.

JAMAICA SAVINGS BANK,
Respondent.

ANSWERING BRIEF SUBMITTED BY JAMAICA SAVINGS BANK, RESPONDENT, IN OPPOSITION TO DEBTOR-PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Statement

JAMAICA SAVINGS BANK (Bank) submits this brief in opposition to the petition of the Debtor, 83rd REALTY COMPANY, for a writ of certiorari to review the determination of the United States Court of Appeals for the Second Circuit, and the United States District Court for the Southern District of New York, both of which courts affirmed an order of the Bankruptcy Court for the Southern District of New York dismissing the Debtor's petition under Chapter XII of the Bankruptcy Act, on the ground that the Debtor's prayer for relief in its

Chapter XII proceeding would contravene the provisions of Sec. 517 of the Bankruptcy Act, (11 USC, Sec. 917).

Relevant portions of the opinion of the Bankruptcy Judge dismissing the proceeding are found on page 4 of the Debtor's brief.

On the Debtor's appeal from the order of dismissal by the Bankruptcy Court, the District Court for the Southern District of New York, (Metzner, D.J.), wrote an opinion sustaining the Bankruptcy Court. That opinion is found on pp. 23 to 25 of the Debtor's brief.

On the Debtor's appeal from the order of the District Court, the order of the Court of Appeals granting Respondent's cross motion in that court to dismiss the appeal for frivolousness, is set forth on page 26 of the Debtor's brief.

The order of said Court of Appeals denying the Debtor's motion for a stay of the Bank's foreclosure action is found on page 27 of the Debtor's brief.

Questions Presented

1. In light of the findings of the Bankruptcy Judge resulting in a dismissal of the Debtor's petition under Chapter XII; in light of the District Court's affirming the order of dismissal; and in light of the order of the Court of Appeals denying a stay of the pending foreclosure and dismissing the appeal for frivolousness and sustaining the two lower courts, may the Debtor bring on this petition for a writ of certiorari?

2. Is Sec. 517 of the Bankruptcy Act, which prohibits the Bankruptcy Court from confirming any plan which extends or impairs any secured obligation held by a member of the Federal Home Loan Bank, constitutional?

3. In view of the statement found on page 5 of the Debtor's brief that the second mortgagee, CURZON & CO., has succeeded in foreclosing upon the Debtor's subject property, is the Debtor's proceeding rendered moot and academic?

4. Is there merit to the Debtor's contention that the Bank's failure promptly to move for a dismissal of the Chapter XII proceeding as being in contravention of Sec. 517 of the Bankruptcy, amounted to the granting of jurisdiction "on consent" upon the Bankruptcy Court?

Background of the Proceeding

The Bank is a member of the Federal Home Loan Bank of New York. It is the holder of a first mortgage on the Debtor's improved real property consisting of a complex of five buildings comprising 180 apartments situated at 8331—116th Street, Kew Gardens, Queens, New York, (the premises).

The premises were constructed in about 1950 under FHA Sec. 608, in order to meet the post-war demand for moderately priced rental housing constructed with FHA-insured mortgage financing.

In January 1974, the Debtor purchased these premises from its previous owner, (CURZON CO.), the second mortgagee, (a party to this proceeding), for an indicated purchase price of $2,250,000; the Debtor took title thereto subject to an existing first mortgage of about $1,600,000 held by the Bank, gave the seller, CURZON CO., a second purchase-money mortgage of about $340,000, and paid the difference in selling price of about $240,000, in cash.

The record taken in the Bankruptcy Court indicates, without substantial dispute, that since the Debtor acquired title in 1974, the physical plant of these premises, namely, the structure and all its appurtenances, have been progressively deteriorating because of the Debtor's failure to make necessary repairs.

By the same token, and correlatively, the premises have shown an operating deficit, under the Debtor's management, because of an inordinate vacancy rate of between 20 and 26 apartments out of a total of 180 apartments; in terms of annual rents lost by virtue of this heavy

vacancy rate, this vacancy experience amounts to a loss of between $60,000 to $75,000 in cash income annually.

During the approximately fifteen months between the Debtor's filing of its Chapter XII petition and the order of November 23, 1977 dismissing the Chapter XII proceeding, the Debtor experienced an operating loss, before providing for debt service, of about $82,000. This operating deficit is augmented by the unpaid debt service during that period of approximately $176,000, making an aggregate operating deficit for that period, inclusive of unpaid debt service, of about $258,000.

The Bank's expert testified before the Bankruptcy Court that by virtue of the deteriorated physical condition of the premises, with the resultant high vacancy rate, the fair value of the premises was $1,600.00.

The Debtor submitted a written appraisal to the Bankruptcy Court indicating a current fair value of the premises of only $1,000,000.

It is against this factual background that the Debtor first submitted its plan of arrangement on February 24, 1977—some six months after it filed its petition for an arrangement.

Thereafter, the Debtor filed various amendments to that plan, the most recent of which was dated July 28, 1977.

With respect to the Bank's mortgage, the Debtor's plan, as amended, gave the Bank a choice of two options:

Under Option A, the Bank's mortgage of $1,600,000, including substantial arrearage and interest, was to be reduced to $1,000,000, with a maturity date fixed at ten years from the date of confirmation.

Under Option B, the Bank's mortgage was to be reduced to the sum of $750,000, with a maturity date ten years from the date of confirmation, with the added provision that the Debtor, which until then was not personally

obligated under the underlying bond and mortgage, would personally assume payment of the bond and mortgage.

The Bank formally rejected said plan of arrangement, as well as the later amendments thereto made by the Debtor.

During the pendency of the Chapter XII proceeding, and in early August 1977, (some six weeks after the Debtor's most recent amendment to its plan of arrangement), the Bank became aware that it was a member of the Federal Home Loan Bank of New York, and had been such a member continuously since 1965 and up to the present.

On the basis of the fact of the Bank's membership in the Federal Home Loan Bank, the Bank moved for an order dismissing the Debtor's Chapter XII petition and proceeding under Sec. 517 of the Bankruptcy Act.

Sec. 517 of the Act provides, as follows:

> "*** nor shall its provisions be deemed to allow extension or impairment of any secured obligation held by *** any Federal Home Loan Bank or member thereof."

The Debtor has never contested the statement in the Bank's moving papers that the Bank, indeed, was a member of the Federal Home Loan Bank of New York during the relevant periods affecting the underlying mortgage.

The Bankruptcy Judge, by his order dated November 23, 1977, made the following findings of fact and directions:

> "1. JAMAICA SAVINGS BANK, first mortgagee herein, has been, at all times relevant to this proceeding, and now is, a member of the FEDERAL HOME LOAN BANK OF NEW YORK.
>
> 2. JAMAICA SAVINGS BANK comes within the provisions of Sec. 517 of the Act and particularly that portion thereof which provides as follows:— 'Nothing contained

in this chapter *** shall *** be deemed to allow extension or impairment of any secured obligation held by *** any FEDERAL HOME LOAN BANK or member thereof.'

3. The various plans and amendments thereto or amended plans filed by both the Debtor and CURZON COMPANY, the secured mortgagee, impair the secured obligation held by JAMAICA SAVINGS BANK on the Debtor's real property; hence, none of the plans or amended plans or amendments to plans filed by the Debtor or CURZON COMPANY may be confirmed.

4. JAMAICA SAVINGS BANK has rejected all the plans or amended plans or amendments to plans filed by both the Debtor and CURZON COMPANY.

5. Accordingly, the petition for arrangement filed by the Debtor under Sec. 422 of the Act, be, and the same hereby is, dismissed, subject to the further provisions of this order set forth hereinbelow, reserving and retaining to this court continued jurisdiction of this proceeding with respect to the matters hereinbelow set forth."

The Bankruptcy Judge's order of dismissal further provided that the automatic stay provided in Rule XII-43 of the Rules of Bankruptcy Procedure, and the restraining order earlier issued by said Bankruptcy Court, dated August 25, 1976, which had restrained the Bank from continuing its pre-Chapter XII foreclosure action instituted by the Bank in the New York Supreme Court, Queens County, to foreclose the subject first mortgage, be vacated and the Bank be authorized to continue with its state foreclosure action against the Debtor.

Accordingly, and on the granting of said order of dismissal, the Bank reactivated its State Court foreclosure action; the Receiver of rents of said premises, earlier appointed by the State Court, assumed management of the property.

A motion made by the Debtor before the Bankruptcy Judge for a stay of the order of dismissal pending a proposed appeal to the District Court was denied by the Bankruptcy Judge.

At the hearing in the Bankruptcy Court on the Debtor's motion for a stay, the court stated, inter alia, as follows:

"In so far as it applies to the stay, the probability is that I would have refused to confirm making the plan on its merits if the Sec. 517 had not been put into sharp focus before hand.

I am not saying that is in any way binding upon the Debtor but it certainly is part of my reasoning and mental processes in refusing to grant the stay.

As far as I was concerned, on one ground or another, this case was over in the Chapter XII court. The Debtor had been given an exorbitantly reasonable amount of time to come up with a program to save its investment in the property and had been unable to do so.

Accordingly, I felt that the time had come to end the proceeding and permit the state remedies to take their course. That being so, I will enter a memorandum endorsement upon the application for stay, which, in effect, recites for the reasons recited before the record before me the application for stay made by the Debtor by OSC, dated December 1, 1977, which was made returnable today, will be denied."

The Debtor then proceeded with its appeal to the District Court for the order of dismissal and moved for a stay pending the determination of the appeal.

The District Court, (Metzner, D.J.), affirmed the order of dismissal and denied the stay. That opinion is set forth on page 23 of the appendix to the Debtor's brief.

In relevant part, the District Judge's opinion states:

"The bankruptcy judge found that none of the various plans submitted by the debtor during the fifteen months from the date it filed its petition could be approved under Section 517, since they all extended or impaired the mor-

tgage held by the bank. Dismissal of the petition followed, since it was found that the debtor has been given 'an exorbitantly reasonable amount of time to come up with a program to save its investment in the property and had been unable to do so.'

On appeal, the debtor argues that the bankruptcy judge erred in holding that Section 517 applied to the proceeding. It asserts that the section should not apply to multi-unit dwellings and that the bank should be required to show actual prejudice.

Appellant's argument that Congress could not have intended Section 517 to apply to this mortgage is premised on nothing more than appellant's view of how the Bankruptcy Act should be written. Appellant cites absolutely no evidence, factual or historical, to permit speculation that the terms of Section 517 were intended to have anything other than their manifest import. Moreover, appellant fails to demonstrate that the section "frustrates" or "emasculates" the purposes of Chapter XII beyond the fact that it disqualifies appellant's various proposals. There is absolutely no basis for reading into the limitation a restriction to one- or two-family homes, as the debtor urges, or to require a showing of prejudice.

Appellant's constitutional argument is equally conclusory and unsupported by statutory or case authority, and merits no discussion.

Finally, erroneously characterizing the issue as one of jurisdiction, appellant asserts that the bank waived any objection to the court's approval of the proffered plans by not raising Section 517 as a bar earlier in the proceeding. Clearly, a plan could not be found to extend or impair the mortgage, and therefore be deemed unapprovable under Section 517 until it was submitted to the bankruptcy court. There wsa no waiver by the bank.

The order is affirmed."

The Debtor then appealed to the Court of Appeals for the Second Circuit and brought on a motion for a stay of

the order of dismissal and of the vacatur of the automatic stay against continuing the State Court foreclosure action.

The Bank thereupon served its cross notice of motion in the Court of Appeals asking for an order dismissing the appeal on the ground that the appeal was frivolous and without merit.

The Court of Appeals at the close of the argument of the appeal and of the various motions denied the Debtor's motion for a stay and granted the Bank's motion to dismiss the appeal for frivolousness.

The Debtor then applied to this court for a stay of the bankruptcy proceedings and of the State Court foreclosure action pending the outcome of the Debtor's filing a petition with this court for a writ of certiorari to the Court of Appeals.

The Debtor's application to this court for such a stay was denied by Mr. Justice Marshall on July 10, 1978.

It is against this legal and factual background that the respondent Bank submits this brief in opposition to the Debtor's petition for a writ of certiorari.

POINT I

IN LIGHT OF THE FINDINGS OF THE BANKRUPTCY JUDGE RESULTING IN A DISMISSAL OF THE DEBTOR'S PETITION UNDER CHAPTER XII; IN LIGHT OF THE DISTRICT COURT'S AFFIRMING THE ORDER OF DISMISSAL; AND IN LIGHT OF THE ORDER OF THE COURT OF APPEALS DENYING A STAY OF THE PENDING FORECLOSURE AND DISMISSING THE APPEAL FOR FRIVOLOUSNESS AND SUSTAINING THE TWO LOWER COURTS, THE DEBTOR'S PETITION FOR A WRIT OF CERTIORARI LACKS MERIT AND IS FRIVOLOUS

Section 517 of the Bankruptcy Act provides as follows:

> "Nothing contained in this chapter shall *** be deemed to allow extension or impairment of any secured obligation held by *** any Federal Home Loan Bank or member thereof."

Three successive courts, namely, the Bankruptcy Court, the District Court and the Court of Appeals, have held that Sec. 517 prohibits the Bankruptcy Court from confirming any plan which extends or impairs any secured obligation held by a member of the Federal Home Loan Bank.

In fact, the Court of Appeals granted the Bank's motion to dismiss the Debtor's appeal for frivolousness. All the contentions now being raised in this court by the Debtor were raised in the lower courts and were rejected by all the lower courts.

The Debtor's brief in this court states nothing that was not already included by the Debtor in the proceedings,

pleadings and arguments in the three lower courts.

The Bank respectfully submits that the Debtor's petition for a writ should be denied for frivolousness.

POINT II

SEC. 517 OF THE BANKRUPTCY ACT PROHIBITING THE BANKRUPTCY COURT FROM CONFIRMING ANY PLAN WHICH EXTENDS OR IMPAIRS ANY SECURED OBLIGATION HELD BY A MEMBER OF THE FEDERAL HOME LOAN BANK IS CONSTITUTIONAL.

The Debtor does not contest that, at all times relevant to this proceeding, the Bank has been a member of the Federal Home Loan Bank of New York; that fact was found by the order of the Bankruptcy Court, dated November 23, 1977, (supra).

Congress, in enacting Sec. 517, intended to accomplish what that section clearly provides, namely, that no plan may be confirmed, the effect and scope of which will be to extend or impair the Bank's mortgage on the Debtor's real property.

The Debtor's plan, as finally amended, clearly calls for an extension of the Bank's mortgage for ten years beyond the confirmation date despite the fact that the Bank's mortgage, by its terms, matures in 1982.

Moreover, it is beyond cavil that the Debtor's amended plan envisages the impairment of the Bank's mortgage by reducing it, under Option A, to $1,000,000 "flat" from $1,600,000, plus accrued interest, and under Option B, calls for a further reduction of the Bank's mortgage to $750,000, this time backed up by the personal guarantee of the Debtor.

It readily appears, therefore, that the Debtor's plan contravenes the prohibition against (a) extension, or (b)

impairment of the Bank's mortgage as spelled out in Sec. 517.

Statutes should be read as they are written. Sec. 517 requires no interpretation—it means just what it says.

A reference to the circumstances under which Sec. 517 was enacted, sustains the Bank's position and the constitutionality of the section.

Sec. 517 was enacted to encourage post-World War II construction of moderately priced rental housing. The financing of such construction was to be accomplished by bank loans. Congress felt that banks would hesitate to lend mortgage money for this type of construction if, under Chapter XII of the Act, the bank's mortgage could be extended or impaired at the instance of mortgagors (debtors) against the banks' wishes; hence, to induce banks to make mortgage loans on the subject type of housing, and to secure the banks against undesired extensions or impairments of their mortgage loans, Congress enacted Sec. 517. The fact is that the subject housing complex was built and financed under what is known as a Sec. 608 Federal Housing Administration Plan—an FHA construction. It was just for this type of construction and financing that Sec. 517 was enacted.

Congress may legislate in this area in a fair and rational manner; it may set up classifications of lending institutions whose securities may not be extended or impaired; this power and authority is within the ambit of the Congressional legislative right.

A comprehensive discussion of Sec. 517 is found in CONSOLIDATED MOTOR INNS, 5 Collier Bankruptcy Cases 301, (W.D. Georgia 1975).

In that case, CLEARWATER FEDERAL SAVINGS & LOAN ASSOCIATION, (the bank), a member of the Federal Home Loan Bank, and the holder of a mortgage on two motels, sought relief from the automatic stay provided by Rule XII-43 of the Rules of Bankruptcy Pro-

cedure, immediately after the filing by the Debtor of the Chapter XII petition.

The Bankruptcy Court first noted that the debtor had an equity in the property, and hence, there was no problem as to the deterioration of the bank's security while the Chapter XII proceeding was pending. This, in turn, brought up the question of whether the debtor planned to have its mortgage "extended" under its proposed plan.

The court there stated:

> "The plaintiff (bank) has not shown an 'extension' of its secured obligation because a plan of arrangement ***has not been filed*** by the defendant (debtor) and it is still possible that the defendant will pay all the obligations within the time permitted by the instruments creating them. This could not constitute an 'extension' and therefore would not be in violation of the second part of Sec. 517."

That court, after tracing the legislative history of "extension," as used in Chapter XII, stated:

> "Since the word extension has a well recognized meaning under the various rehabilitative chapters of the Bankruptcy Act and was clearly envisioned, at the time Chapter XII was created, as a possible type of plan under that chapter, this court has no alternative but to construe the word 'extension' in the second part of Sec. 517 as meaning a plan under which debts are paid in full but over a longer period of time than would otherwise be required."

In the case at bar, the Debtor has consistently contended that the current value of the Bank's collateral is less than the balance due on the Bank's secured obligation, namely, that the fair value of the premises is $1,000,000 as against a balance of $1,600,000, plus substantial accrued interest due on the Bank's secured obligation.

From the foregoing, it readily appears, in the case at bar, that the Debtor has no equity in the real property which can be preserved through the medium of this Chapter XII proceeding. Again, as stated above, the

amended plan filed by the Debtor clearly envisages an extension of the mortgage for ten years beyond confirmation date as against the present maturity date of June 1, 1982, as provided in the Bank's mortgage.

On either count, namely, impairment of the Bank's mortgage, or extension of the Bank's mortgage, the plan violates the prohibition contained in Sec. 517.

A related case is HALL ASSOCIATES, 8 Collier Bankruptcy Cases, 290 (W.D. Pennsylvania 1976). There, the mortgagee, a member of the Federal Home Loan Bank, sought relief from the automatic stay provided by Rule XII-43 of the Rules of Bankruptcy Procedure. The bank there contended that the automatic stay was an ipso facto extension of its mortgage, and hence, violated Sec. 517.

There, the court, after finding that the debtor had an equity in the real property, (a situation not present in the case at bar), delayed dismissal of the Chapter XII proceeding pending a hearing as to the terms of the plan to be submitted. The court there stated:

> "We turn therefore to the issue of whether the prolongation of the temporary stay will impair the petitioner's collateral. We think it would not. As of January 1, 1976, the amount due the petitioner was $3,281,594.90 and we accept the testimony of the Debtor's real estate expert that the fair market value of the petitioner's collateral is $3,550,000. Accordingly, we envision no financial harm to the petitioner during the reasonable interval during which creditors may indicate their approval or rejection of that plan."

Moreover, in the case at bar, it is undenied that during the fifteen months between the Debtor's filing of its petition for arrangement and dismissal of its petition, the premises were operating at a loss of some $82,000 before debt service and that debt service amounted to an additional $176,000, making an aggregate deficit in operations of $258,000.

In addition, it is undenied that since the Debtor acquired ownership of the subject property in 1974, and up to the present, it has consistently allowed the premises to spiral downwards into a state of disrepair; that the premises are suffering from an inordinately high rate of vacancies directly attributable to the Debtor's mismanagement and failure to maintain the premises in good repair.

In light of the fact that the Debtor has no equity in the premises and that the premises are operating and have been operating under repeated and mounting deficits and that the premises are in a state of disrepair and require substantial sums to make necessary repairs as well as to upgrade and modernize the apartments and their installations so as to reduce the high rate of vacancies, the Bankruptcy Court was justified in dismissing the proceeding.

In the matter of WINTROP ASSOCIATES (D.C. Maryland, Docket No. 76-1437-K, Bankruptcy Judge Kayser), the mortgagee sought the protection of Sec. 517 on the ground that it was a member of the Federal Home Loan Bank.

In that case, the mortgage became due prior to the Debtor's filing of its Chapter XII petition. The mortgagee moved to dismiss the proceeding on the ground that the Debtor had no equity in the property and additionally, because of the impact of Sec. 517 with respect to a mortgagee which is a member of the Federal Loan Bank.

In finding in favor of the mortgagee, the court stated:

> "The indefinite continuation of this stay against Vermont's enforcement of its lien against the subject property, would constitute an extension, impairment of the secured obligation held by Vermont.
>
> The indefinite continuation of this stay against Vermont's

enforcement of its lien against the subject property is unwarranted and unjustified since the fair market value of Vermont's collateral is less than the aggregate amount of the filed liens and encumbrances against the subject property."

In the foregoing case, the court, however, granted the debtor an opportunity to submit, within thirty days, a proposed plan for the payment of the entire secured debt. It later transpired that the Debtor was unable to raise the necessary funds to pay the mortgage in full and the proceeding was dismissed.

In summary, the Bank submits that Sec. 517 is constitutional; it is premised upon sound legislative criteria; it sets up a classification of secured creditors, namely, mortgagees which are declared to be beyond the power of the Bankruptcy Court to extend or impair their secured obligations if such mortgagee be a member of the Federal Home Loan Bank; that the Debtor's amended plan did indeed seek to extend and impair the Bank's secured obligation at a time when the Bank was a member of the Federal Home Loan Bank; hence, as the Bankruptcy Judge found the various plans and amendments thereto filed by the Debtor tended to extend or impair the obligations held by the Bank that none of the plans so filed may be confirmed, and that accordingly, the proceeding was dismissed.

POINT III

IN VIEW OF THE STATEMENT FOUND ON PAGE 5 OF THE DEBTOR'S BRIEF THAT THE SECOND MORTGAGEE, CURZON & CO., HAS SUCCEEDED IN FORECLOSING UPON THE DEBTOR'S SUBJECT PROPERTY THE DEBTOR'S CHAPTER XII PROCEEDING IS THEREBY RENDERED ACADEMIC AND MOOT.

On page 5 of the Debtor's brief, the Debtor states: "Since the proceedings below, the second mortgagee, CURZON & COMPANY, has succeeded in foreclosing upon the property."

It is respectfully submitted that in light of this fact, namely, the completion of the foreclosure action brought by the holder of the second mortgage on the Debtor's real property, the Debtor's Chapter XII proceeding is thereby rendered academic and moot. The Debtor no longer owns the subject real property; it was sold in the course of the completion of the second mortgagee's foreclosure action.

POINT IV

THERE IS NO MERIT TO THE DEBTOR'S CONTENTION THAT THE BANK'S FAILURE PROMPTLY TO MOVE FOR A DISMISSAL OF THE CHAPTER XII PROCEEDING AS BEING IN CONTRAVENTION OF SEC. 517 OF THE BANKRUPTCY ACT, AMOUNTED TO THE GRANTING OF JURISDICTION "ON CONSENT" UPON THE BANKRUPTCY COURT.

The Debtor's original plan is dated February 24, 1977—filed some six months after it filed its original petition for an arrangement.

Thereafter, the Debtor filed various amendments to its original plan by amended plans dated June 29, 1977 and July 28, 1977.

It was not until August 1977 that the Bank, and its attorneys in this proceeding, became aware of the fact that the Bank was indeed a member of the Federal Home Loan Bank of New York whereupon the Bank promptly moved, by petition and notice of motion, dated August 8, 1977, for a dismissal of the Chapter XII proceedings as being in contravention of the provisions of Sec. 517.

The Bank could not determine whether the Debtor's plan contravened the provisions of Sec. 517 until the Debtor filed its plan. It was not until six months after the arrangement proceeding was filed, namely, on February 24, 1977, that the Debtor filed its original plan.

Moreover, the original plan of February 1977 was amended from time to time, the most recent amendment being dated July 28, 1977. It was shortly after the Debtor filed its third amendment to its original plan, namely, July 28, 1977, that the Bank moved for a dismissal of the proceeding under Sec. 517.

When this point was raised during the appeal to the District Court, the court correctly noted that jurisdiction cannot be conferred upon the Bankruptcy Court by acts of the parties when indeed there was no foundation for such jurisdiction, and that if the Debtor's plan contravened Sec. 517, the court could not entertain the Debtor's plan if it tended to extend or impair the Bank's obligation.

In any event, the Debtor has failed to show that it was prejudiced in the slightest degree by the Bank's not making its motion under Sec. 517 until early August 1977.

A. The Debtor, in Point I, page 7, of its brief, makes the unsubstantiated statement, which the Respondent rejects, that:

> "If interpreted to a dryly logical extreme, it is obvious that Chapter XII would be substantially frustrated since virtually any bank involved in extending credit in connection with a real estate transaction would be a dues-paying member of the Federal Home Loan Bank."

Again, under Point III, at page 16, the Debtor erroneously states that:

> "Virtually every bank is a member of the Federal Home Loan Bank, since presumably, by merely paying dues, one remains a member."

These statements which imply that all banks are members of the Federal Home Loan Bank are not factually true and are not part of the record. It is fair to assume that many banks which prefer not to pay the substantial dues which are coupled with membership in the Federal Loan Bank, would prefer not to be members of the Federal Home Loan Bank.

B. Under Point II, at page 16, the Debtor states:

> "We submit that the Bank has not demonstratd why it would be irreparably damaged by a stay ***."

Contrary to the Debtor's assertion, the record clearly shows that the subject real property during the pendency of the Chapter XII proceeding has been operating under a substantial deficit; that net rent income, after paying maintenance and operating charges, taxes, etc. is insufficient to pay any part of the debt service due to the Bank.

C. The Debtor erroneously contends, under Point III, that "The Federal Home Loan Bank was never intended to apply to commercial property."

The Debtor further states, on page 17 of its brief:

> "The Bank would have the Court remove the possibility of any individual or partnership having available a rehabilitation opportunity in those instances in which secured obligations are held by Federal Savings and Loan Associations."

Both these statements made by the Debtor in Point III are incorrect. Congress has classified secured creditors (mortgagees) into two classes; one class comprises banks which are members of the Federal Home Loan Bank, and the second class comprises banks which are not members of the Federal Home Loan Bank.

Under the first classification, namely, membership in the Federal Home Loan Bank, all of whose members pay dues for mutual preservation based upon the dollar amount of loans made by them under the umbrella of the Federal Home Loan Bank, Congress sought to encourage bank members of the Federal Home Loan Bank to finance the construction of FHA 608 dwellings and to induce such financing, Congress, under Sec. 517 of the Act, exempted such bank members of the Federal Home Loan Bank from

extension or impairment of their secured mortgages. This classification is properly within the purview of the legitimate legislative power of Congress.

D. Under Point IV of its brief, the Debtor contends that the Bank "consented" to the Bankruptcy Court's jurisdiction. The issue is not whether the Bank consented to jurisdiction; the issue is may the court confirm a plan which contravenes the provisions of Sec. 517 as it may affect a mortgagee who is a member of the Federal Home Loan Bank.

This is not merely a matter of jurisdiction in its strict sense; this is a matter of whether the Bankruptcy Court has power in this proceeding to confirm a plan which extends or impairs the mortgage held by the Bank at a time when the Bank is a member of the Federal Home Loan Bank.

All the courts below have held that Sec. 517 prohibits a Bankruptcy Court from confirming such a plan affecting a member of a Federal Home Loan Bank.

CONCLUSION

Sec. 517 is constitutional; it prohibits a Bankruptcy Court from confirming a plan of arrangement which would extend or impair an obligation held by a bank which is a member of the Federal Home Loan Bank; the Debtor's proposed plan, as amended, does extend and impair the secured obligation held by the Respondent Bank; hence, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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